No. 85-1491

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

DENNIS RAY BELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the district court, in accepting his guilty plea, failed to establish that he understood the nature of the charges, as is required by Fed. R. Crim. P. 11(c)(1).

1. On the basis of his plea of guilty, petitioner was convicted of conspiracy to import marijuana, in violation of 21 U.S.C. 952(a) and 963, and conspiracy to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 846. He was sentenced to eight years' imprisonment. The court of appeals affirmed (Pet. App. 1a-19a).

The pertinent facts are set forth in the opinion of the court of appeals (Pet. App. 2a-3a, 8a-11a & n.13). In May 1983, an informant introduced undercover Drug Enforcement Administration (DEA) Agent Stephen Collins to Charles Kuylen and Norman Weir, who were seeking to

smuggle approximately 1500 pounds of marijuana from Belize into the United States. Collins agreed to obtain an aircraft and pilot for use in the smuggling venture. Collins later had several meetings with Kuylen and Weir and a telephone conversation with petitioner in which the problems involved in the operation were discussed. Thereafter, an undercover DEA agent, playing the role of the pilot, showed an airplane to Kuylen and Weir.

Near the end of May, the smuggling operation was delayed because military exercises were being conducted in Belize that made it unsafe to bring in the plane. Petitioner told Collins that he was upset by the delay because he had invested $200,000 in the venture. The mission was rescheduled for May 29, when the agents planned to arrest Weir upon his delivery of money to the pilot at the Orlando Airport. However, military exercises in Belize again forced the postponement of the trip.

On June 8, 1983, Collins offered Kuylen and Weir 2000 pounds of marijuana at a price of $50,000. In response to the offer, Weir stated that he would have to consult petitioner as the person in charge of the operation. Collins later gave Weir a sample bale of marijuana to show petitioner. The day after the bale was delivered to petitioner, DEA agents arrested Kuylen and Weir, who immediately agreed to cooperate in the investigation of petitioner. During the following week Weir and petitioner had several telephone conversations that were recorded by the DEA. Petitioner also told Collins that the deal would go through once petitioner got in touch with the buyer for whom he was working. On July 8, agents executed a search warrant at petitioner's residence, recovered the bale of marijuana, and arrested petitioner.

2. On July 13, 1983, petitioner was charged in a two-count indictment with conspiracy to import marijuana and conspiracy to possess marijuana with intent to distribute it.

He was arraigned on July 28 and entered a plea of not guilty. On October 5, 1983, a superseding indictment was returned, and petitioner was again arraigned and pleaded not guilty on October 6.

Petitioner filed a number of pretrial motions in the district court. Thereafter, on February 21, 1984, petitioner entered into a written plea agreement with the government (Pet. App. 20a-22a). The agreement provided that petitioner would enter a conditional plea of guilty to the two marijuana conspiracy charges and that he would preserve his right to appeal the denial of his motion to dismiss the indictment.

At the hearing at which petitioner entered his guilty plea, the district court granted a defense request for a recess to afford petitioner the opportuntiy to discuss the plea agreement with the three attorneys who were representing him (Pet. App. 8a, 25a-26a). Upon reconvening, the district court asked petitioner about his education and occupation and determined that petitioner had attended college and was in the real estate business (*id.* at 8a, 26a). The court then ascertained from petitioner that he was freely and voluntarily entering into the plea agreement after consulting with his attorneys (*id.* at 9a & n.12, 27a). After the government presented Agent Collins to provide a detailed factual basis for the plea (*id.* at 9a-12a n.13, 29a-33a), petitioner's counsel stated (*id.* at 10a-11a, 33a):

> I believe that recitation is exactly what the Government would offer as proof in this case, that it would support a conviction for conspiracy to import marijuana and a conviction for conspiracy to possess marijuana with the intent to distribute it, and we have no evidence to offer contrary to the proffered testimony by the Government.

The district court then accepted petitioner's guilty plea (*id.* at 11a, 33a). Defense counsel raised no objection to the completeness or adequacy of the plea proceeding.

3. On appeal, petitioner contended, inter alia, that the district court violated Fed. R. Crim. P. 11(c)(1) by failing to establish that he understood the nature of the charges to which he was pleading guilty. The court of appeals agreed that "it would have been preferable for the district court to have read the indictment to [petitioner] and thereafter given him the opportunity to ask questions about the indictment" (Pet. App. 13a). However, the court concluded that "in this instance, to permit [petitioner] to replead would be to raise form over substance" (*ibid.*). In so ruling, the court pointed out that petitioner "had the benefit of a written plea agreement which clearly and concisely set forth the charges" (*id.* at 8a (footnote omitted)) and that the charges against petitioner "were 'simple' ones" (*ibid.* (citation omitted)). In addition, the court noted that petitioner had been granted a recess at the Rule 11 hearing to discuss the plea agreement with his attorneys (*ibid.*). Finally, the court observed that petitioner "was a sophisticated and intelligent person who was fully able to understand the nature of the charges against him" (*id.* at 8a-9a (footnote omitted)). For these reasons, the court found, "there is no conceivable way that [petitioner] could have misunderstood the nature of the charges involved" (*id.* at 13a). Thus, "based on the facts of this case, we find no violation of Rule 11" (*ibid.*).

4. The court of appeals correctly rejected petitioner's contention that the district court violated Rule 11 in this case. The decision below does not conflict with any decision of this Court or any other court of appeals, and is limited to the particular facts of this case. Accordingly, further review is not warranted.

Fed. R. Crim. P. 11(c)(1) provides that "[b]efore accepting a plea of guilty * * *, the court must address the defendant personally in open court and inform him of, and determine that he understands, * * * the nature of the charge to which the plea is offered * * *." As explained in the advisory committee note to the 1974 amendment to Rule 11, "[t]he method by which the defendant's understanding of the nature of the charge is determined may vary from case to case, depending on the complexity of the circumstances and the particular defendant." See also 1 C. Wright, *Federal Practice and Procedure: Criminal* § 173, at 587-588 (2d ed. 1982) (footnotes omitted) ("There is no simple or mechanical rule as to how the court is to determine defendant's understanding of the charge. Some defendants are more sophisticated than others and some charges are more difficult to understand than others".).

In addition, Rule 11(h) states that "[a]ny variance from the procedures required by this rule which does not affect substantial rights shall be disregarded." The 1983 advisory committee note states that this provision was designed to ensure that harmless error principles would be applicable to Rule 11 violations. In particular, Rule 11(h) was intended to overturn the rule of per se reversal adopted by the Court in *McCarthy* v. *United States*, 394 U.S. 459 (1969), upon which petitioner relies.

Contrary to petitioner's contention, the district court took steps at the Rule 11 hearing to ensure that petitioner understood the nature of the charges. The court granted a defense request for a recess of the hearing to enable petitioner to confer with his attorneys about the plea agreement. Cf. *Marshall* v. *Lonberger*, 459 U.S. 422, 436 (1983) (citation omitted) (" 'it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice

of what he is being asked to admit' "). The court also inquired of petitioner as to his educational and vocational background, which established that he "was a sophisticated and intelligent person who was fully able to understand the nature of the charges against him" (Pet. App. 8a-9a). Moreover, the government offered a detailed statement of the factual basis of the offenses, which further put petitioner on notice of the essential nature of the charges against him. In response, petitioner's counsel agreed that the evidence proffered by the government would support a conviction on the two conspiracy counts to which petitioner was pleading guilty (*id.* at 33a). Petitioner, who was represented by counsel at all stages of the prosecution, never objected that he did not understand the charges to which he was entering a guilty plea; indeed, he did not raise the Rule 11 issue until after he had been sentenced, and even now he does not assert that he actually misunderstood the charges. At least where, as here, "[t]he charges * * * were 'simple' ones" (*id.* at 8a (citation omitted)) and petitioner "had the benefit of a written plea agreement which clearly and concisely set forth the charges" (*ibid.* (footnote omitted)), the guilty plea proceeding was in substantial compliance with Rule 11 and provides no ground for setting aside the guilty plea.*

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*Petitioner's reliance (Pet. 6) on *United States* v. *Corbett*, 742 F.2d 173 (5th Cir. 1984), and *United States* v. *Punch*, 709 F.2d 889 (5th Cir. 1983), is misplaced. In *Corbett*, the court of appeals found that there was "an entire failure" by the district court "to address * * * [the] core concern[]" of Rule 11 that the defendant understand the nature of the charges (742 F.2d at 178); as the court recognized (742 F.2d at 178 n.14), " 'inadequate addresses' of the core concerns that do not rise to the level of 'entire failures' do not require automatic reversal." Similarly, in *Punch*, the court held that the "entire failure" by the district court to address the "core concern" that the defendant understand the nature of the charges requires automatic reversal (709 F.2d at 891); the defect in the plea proceeding in *Punch* was especially significant in light of the defendant's continued assertion that he had not committed the offense charged (709 F.2d at 893, 894-895). In the present case, in contrast to *Corbett* and *Punch*, there was no "entire failure" to address this core concern of Rule 11(c)(1) at the plea hearing.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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